IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 57 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1/1 RASUBEN DESALJI & 1/5

Versus

MUMAN ABRAM RAJEMAD THROUGH NURIBEN WD/O ABHRAMBHAIRAJEMAD

Appearance:

MR EE SAIYED for appellants

MS SK ZAVERI for respondents

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 4/11/1999

ORAL JUDGEMENT

1. This Second Appeal against the judgment and decree dated 14.9.1993 recorded in Regular Civil Appeal No.88 of 1992 by learned Second Joint District Judge, Mehsana, Camp at Patan, at the instance of the defendants was admitted for hearing on the following substantial question of law:

"If the proceedings under S.32 (o) of the Tenancy Act are terminated by the Tenancy Court on the finding that the applicants are cultivating the disputed land as owners whether the Civil Court

before whom proceedings for eviction and possession are taken out on the ground that the applicants are not owners of the disputed land, can pass such a decree without first referring the matter to the Tenancy Court for completion of proceedings under S.32 (o)?"

2. Appellants are the original defendants whereas respondent No.1 is the original plaintiff and respondent Nos.2 and 3 are the original defendants No.4 and 5. They are, therefore, hereinafter referred to as 'the plaintiff' and 'the defendants' for the sake of convenience and brevity.

3. Case of the plaintiff was that field bearing Survey No. 126 admeasuring 3 Acres and 35 Gunthas situated in the sim of village Koyata, Taluka Patan, District Mehsana was purchased by him from one Nagardas Nyalchand by sale deed dated 20.6.1942 and by virtue of the said sale deed he became owner of the said land and till the year 1980 he was personally cultivating the said land in the capacity of owner. It was the case of the plaintiff that the defendants were in majority in village Koyata and they were militant persons and, therefore, in the year 1980-81 the defendants gave him threat to murder him and compelled him to leave village Koyata. As a result of the threat, the plaintiff was compelled to leave village Koyata and he settled down at Vagrol of Sidhpur Taluka.

3.1. It was further case of the plaintiff that on 24.12.1985 defendant illegally and forcibly took unauthorized possession of the suit land and started cultivation from the year 1981-82. The plaintiff therefore was obliged to file the suit for possession alleging that the defendants were trespassers upon the suit land.

3.2. The suit was resisted and contested by defendants by filing written statement at Ex.21. They pleaded that they have purchased the suit land from the plaintiff for consideration of Rs.11,500/- It was also pleaded that plaintiff was in need of money as he wanted to settle at village Vagrol and therefore he requested the defendants to purchase the suit land and upon his request the defendants purchased the suit land. It was also contended that the plaintiff gave assurance that he will execute the sale deed in due course. However, plaintiff thereafter backed out from his words and filed the suit. It was also denied that they have illegally trespassed on the suit land since 1981-82. It was pleaded that since

1973-74 the defendants were cultivating the suit land and thereafter in the year 1980-81 the plaintiff sold the suit land to the defendants for consideration of Rs.11,500/- It was also pleaded that Ganot Case was initiated in the Court of Mamlatdar and during the said proceeding it was felt by the plaintiff that the suit land would go to the defendants by way of tenancy right and, therefore, he has entered into an agreement with the defendants for selling the suit land. Ultimately, it was pleaded that the suit filed by the plaintiff was a false one and was liable to be dismissed and prayed for dismissal of the suit.

3.3. The learned trial Judge framed issues, recorded evidence and after considering, appreciating and evaluating the same and after hearing learned advocates for the parties, recorded following conclusions:

(i) The suit land belonged to the plaintiff.
(ii) The defendants committed trespass over the suit land.
(iii) Agreement to sell for selling the property for consideration of Rs.11,500/- has not been proved.
(iv) The plaintiff is entitled to possession of the suit property.

3.4. On the aforesaid premises, learned trial Judge allowed the suit and passed decree of possession as prayed for by judgment and decree dated 31.7.1992.

3.5. Aggrieved thereby defendants went in appeal before the learned District Judge, Mehsana by filing Regular Civil Appeal No. 88 of 1992.

3.6. The learned lower appellate Judge, on reappreciation and reevaluation of the evidence and submissions made at the bar, confirmed the judgment and decree recorded by the learned trial Judge by dismissing the appeal.

3.7. It is this judgment and decree whereby concurrent findings of facts have been recorded by both the courts which is under challenge in this Second Appeal at the instance of the defendants on the substantial question of law which has been indicated hereinabove.

4. At the outset it is to be noted that the suit land belonged to the plaintiff by virtue of sale deed which was executed in 1942, as per Ex.39 and defendants have also not disputed that aspect of the case. Therefore, it is proved that since 1942 the plaintiff

became the absolute owner of the suit land by virtue of the said sale deed.

5. It was the case of the plaintiff that defendants used to give him threat frequently since 1979-80 and therefore he left village Koyata and started residing at village Vagrol. Thereafter defendants forcibly entered into the suit field in his absence and started cultivating the said land about which he came to know in 1985 and therefore he immediately filed the suit. Exhs. 40 and 41 are the copies of pani patraks (village form No.7/12) wherein also name of the plaintiff has been shown upto 1980 and thereafter somehow or the other names of the defendants have been shown in the column of cultivators.

6. The case of the defendants was that as they were cultivating the land since 1980-81 they became tenants and therefore proceedings under section 32 (o) of the Bombay Tenancy and Agricultural Lands Act, 1948 ('the Act' for short) were also initiated and as the plaintiff came to know about the said proceedings and when he felt that the suit land would go to the defendants, he sold the said land to the defendants for a consideration of Rs.11,500/- It may be appreciated that the said document i.e., agreement to sell has not been produced in the proceedings and only oral evidence in that regard was led by the defendants.

7. In the backdrop of aforesaid factual scenario, let us now examine the rival contentions of both the parties and then the substantial question of law formulated at the time of admission of this Second Appeal.

8. It was contended by learned advocate Mr. Saiyed that Ganot case was initiated under section 32 (o) of the Act which was dropped on the ground that the defendants were in possession by virtue of the agreement to sell. However, the learned trial Judge ought to have referred the said issue to the Tenancy Court to decide de-novo but since the learned trial Judge has failed to do so, the judgment and decree recorded by both the courts below is bad in law and as the same being substantial question of law, this Court cannot be oblivious of the said substantial question of law and hence the matter requires to be remanded to the trial Court for raising the said issue, by allowing the Second Appeal.

9. The aforesaid contention of learned advocate Mr. Saiyed has been streneously assailed by learned advocate

Saiyed has been strenuously assailed by learned advocate which is an order recorded by the Mamlatdar in Ganot Case No.32(o)/810/84 dated 26.6.1985 wherein it was specifically mentioned that the defendants were not personally cultivating the said land and, therefore, the notice which was issued under Section 32 (o) of the Act was withdrawn. In view of the aforesaid state of affairs runs further submission that the learned trial Judge has rightly not referred the said issue to the Mamlatdar as it was already decided. Therefore, according to him, there is no substantial question of law which requires consideration in this Second Appeal and as there is no substantial question of law to be decided by this Court, the Second Appeal may be dismissed.

10. I have given my anxious considerate thought to the rival contentions raised by both the learned advocates and on having perusal of document Ex.42 which is an order recorded by the Mamlatdar in Ganot Case No.32(o)/810/84 dated 26.6.1985 it is clear that the Mamlatdar had held that the defendants were not personally cultivating the said land and therefore notice issued under Section 32 (o) of the Act was withdrawn and the document upon which reliance was placed by the defendants was sent to the competent officer for impounding and copy of the said order was also sent to both the parties. The said order has become final as no appeal was filed against it. To put it differently, proceedings initiated by the Mamlatdar under Section 32 (o) of the Act have been dropped by withdrawing notice since the defendants have failed to establish that they were personally cultivating the said land.

11. In view of the aforesaid state of affairs, I am of the opinion that the proceedings initiated under section 32 (o) of the Act has become final and hence the Civil Court cannot refer the said issue to the Tenancy Court to decide it de-novo. The proceedings initiated under Section 32 (o) of the Act about which contention was raised in the written statement have been already answered by the Tenancy Court and therefore the learned Civil Judge has rightly not framed the issue in that regard and the learned trial Judge was correct in his approach in proceeding the case of the defendants on the basis of the so-called oral agreement to sell.

12. For the foregoing reasons, the substantial question of law on which the appeal was admitted is answered in negative and against the defendants.

13. Turning to other submissions canvassed by the

learned advocate Mr. Saiyed for the appellants that the learned trial Judge has wrongly disbelieved the say of the defendants with respect to the oral agreement to sell entered into between the parties, on having perusal of the evidence and judgment impugned, I am of the opinion that the learned trial Judge has rightly disbelieved the say of the defendants and the learned lower appellate Judge has also very rightly affirmed the said finding of facts. In my view, the defendants ought to have produced the document i.e., agreement to sell, which, according to them, was a kacha writing on a piece of paper and which has been sent by the tenancy court for impounding or they ought to have produced it by examining witness from the office of the competent officer to whom the said document was sent by the Mamlatdar to corroborate the contention with regard to oral agreement to sell. Since defendants failed to do so, there was no evidence with respect to the agreement to sell and therefore there cannot be any escape from the conclusion that the defendants were trespassers on the disputed land and they were liable to be evicted therefrom. The learned trial Judge has very rightly appreciated the factual aspect of the case and very rightly recorded the findings with regard to the disputed land that the defendants having committed trespass over the suit land and the learned lower appellate Judge has very rightly, upon reappreciation and reevaluation of the evidence, affirmed the said finding of facts recorded by the learned trial Judge.

14. According to me, the aforesaid concurrent findings of facts recorded by both the courts below cannot be assailed in this second appeal while exercising powers under Section 100 of the Civil Procedure Code ('the Code' for short).

15. I am fortified in my above view by the judgment of the Hon'ble Apex Court in the case of Karnataka Board of Wakf v. Anjuman-E-Ismail Madris-Un-Niswan, (1999) 6 SCC 343, wherein the Hon'ble Supreme Court has observed that concurrent findings of fact cannot be assailed in second appeal. In the case of Panchugopal Barua & ors. v. Umesh Chandra Goswami & ors., JT 1997 (2) SC 554, the Hon'ble Supreme Court has held that substantial question of law is sine-qua-non for exercise of jurisdiction under Section 100 of the Code. It was further held that generally speaking, an appellant is not to be allowed to set up a new case in second appeal or raise a new issue (otherwise than a jurisdictional one), not supported by the pleadings or evidence on the record and unless the appeal involves a substantial question of law, a second appeal shall not lie to the High Court under the amended

provisions.

16. Seen in the above context, the substantial question of law which has been formulated by this Court is answered in the negative and in view of the settled proposition of law that the concurrent findings of both the courts below cannot be assailed in the second appeal, this Second Appeal being devoid of any merits is liable to be dismissed. Resultantly, the appeal fails and it is dismissed leaving the parties to bear their own costs.

17. Learned advocate Mr. Zaveri states that the decree recorded by the trial Court and confirmed by the Appellate Court has already been once executed and pursuant to that the possession was also taken by the respondents/plaintiffs. However, by virtue of the order recorded in Civil Application this Court while admitting the Second Appeal, the possession was restored to the appellants/defendants. Therefore, now, the respondents will have to again execute the decree for recovery of possession by virtue of the order of dismissal of Second Appeal recorded by this Court.

18. In view of the aforesaid submission, the appellants/defendants are directed to hand over possession of the land in question to the respondents/plaintiffs forthwith failing which respondents/plaintiffs are directed to execute the decree afresh for recovery of the possession of the land in question.

19. Ad-interim injunction granted earlier while recording order in Civil Application shall stand vacated.

(karan)